GANAM RAJAMANY

v.

SOMOO SINNIAH

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 151 OF 1982]
14 JULY 1984

CONTRACT: *Sale and purchase agreements - Amount paid - Whether as claimed by plaintiff - Deposit paid to third party - Whether third party agent of plaintiff - Acknowledgement of receipt in sale and purchase agreement - Whether plaintiff estopped - Completion of contract - Delay in payment - Whether originally time of essence of contract - Whether subsequently time made essence of contract - Notice of rescission - Effect - Specific performance - Discretion of Court - Whether properly exercised - Counterclaim for rescission - Whether should be allowed - Restitutio in integrum - Whether possible - Damages - Compensation - Mesne profits - Interest - Set-off - Entitlement of the parties.*

The plaintiff was the registered owner of four parcels of land in the Mukim of Tanjong Karang. She entered into two sale and purchase agreements with the defendant. On 9 September 1974, she agreed to sell all the parcels to the defendant at the price of RM90,000. Two sale and purchase agreements were executed. The date of completion was fixed for 31 March 1977. The plaintiff purported to rescind the contracts on 9 November 1977 on the ground that the defendant had paid only RM26,000 up to due date or within a reasonable time thereafter. On 11 May 1978, the plaintiff took out a writ in the High Court against the defendant, seeking, *inter alia*, a declaration that the said contracts had been effectively rescinded. The defendant raised a number of issues. The Judicial Commissioner found in favour of the plaintiff in respect of the first three issues. Regarding the amount paid to the plaintiff, the Judicial Commissioner held that in fact RM36,000 had been paid. Specific performance of the contracts was ordered. The plaintiff appealed.

Held:

[1] Only RM26,000 had been paid to the plaintiff. The finding of the Judicial Commissioner by way of inference that the plaintiff had received the deposit of RM10,000 could not be supported.

(a) The third party who had received RM10,000 from the defendant was not the agent of the plaintiff. The burden of proving agency was on the defendant and the defendant had failed to discharge the burden.

(b) The Judicial Commissioner was wrong in law to shut off the oral testimony of the plaintiff that she had infact not received the RM10,000 from the defendant. The plaintiff was not estopped by ss. 91 and 92 of the Evidence Act 1950 by her acknowledgment in one of the contracts of receipt of the payment from adducing evidence that the sum was in fact not paid to or received by her.

[2] The unilateral act of the plaintiff in purporting on 9 November 1977 to rescind the two contracts was wrong in law and did not put an end to the contracts between the parties.

(a) The parties did not intend, either expressly or impliedly, to make time the essence of the contracts. Time fixed by the parties for completion or performance is not to be strictly construed unless it is the intention of the parties that time should be of the essence of the contract. The intention might be express or implied, and is to be gathered by the examination amongst other things of attendant circumstances.

(b) Neither was time subsequently made the essence of the contract. The plaintiff could have made time the essence of the contract by giving notice to the defendant to complete the contracts within a reasonable time, but this she had failed to do. Such notice is excused where a condition precedent binds the parties or in the case of a fundamental breach.

(c) The purported rescission by the plaintiff was not accepted by the defendant. In fact the defendant was ready and willing to complete the contract. A wrongful repudiation by one party cannot, except by the election of the other so to treat it, put an end to the obligation if the other party still insists on performance of the contract.

[3] However, the Judicial Commissioner was wrong to decree an order that the contracts be specifically performed. The jurisdiction of the Court to decree specific performance is a discretionary one. In the exercise of its discretion the circumstances of the case, the conduct of the parties and their respective interests under the contract must be considered. As the Court had ordered specific performance, the onus was on the plaintiff to satisfy the Court that the Judicial Commissioner had not properly exercised his discretion.

(a) The conduct of the defendant was unreasonable. The defendant was unable to show that not only was he ready and willing to complete the sale but also that he had performed or had been at all times been ready and willing to perform his part of the contract or his part of the obligations under the contract as fixed or interpreted by the Court. Nowhere did he plead or adduce evidence to show his readiness and willingness to pay the balance as fixed by the Court. The averment of such readiness and willingness in a suit for specific performance is necessary. The Indian and English requirements in this matter are the same.

(b) The Judicial Commissioner ought to have considered s. 21(3) of the Specific Relief Act 1950, but did not appear to have done so.

[4] The defendant's counterclaim, for rescission of the contracts, should be allowed. It was a fit and proper case for the Court to exercise its power contained in the second limb of s. 36 of the Specific Relief Act. The Court was satisfied that *restitutio in integrum* was possible.

[5] The defendant however was not entitled to damages but to compensation by way of the return of the sum of RM26,000 paid by him to the plaintiff. He who seeks equity must do equity.

[6] Since the contracts had been rescinded by the Court, the plaintiff was not entitled to *mesne* profits in respect of the four properties but only to reasonable compensation.

[7] No interest should be awarded.

[8] The plaintiff should be allowed to set-off against the RM26,000 which she was ordered to pay to the defendant.

[Judgment of Judicial Commissioner decreeing specific performance set aside. Each party to pay own costs in the Federal Court and the High Court]

Cases referred to:
The Firm of TARCT v. The Firm of SVKR [1955] MLJ 2, [1952] MLJ 198
Linck, Moeller & Co. v. Jameson & Co. [1885-86] 2 TLR 207
Sah Lal Chand v. Indarjit [1899-00] 27 1A 93
Jamshed v. Burjorji [1915] AIR PC 83
Stickney v. Keeble [1915] AC 386
Warren v. Tay Say Geok & Ors. [1965] 1 MLJ 44
Steedman v. Drinkle [1916] AC 275
Brickles v. Snell [1916] 2 AC 599
Tilley v. Thomas [1867] 3 Ch App 61
Haji Hassan v. Tan Ah Kian [1963] MLJ 175
Yeow Kim Pong Realty Ltd v. Ng Kim Pong [1962] MLJ 118
Lee Yew Hins v. Kow Lup Piow [1974] 1 MLJ 114
Establishment Chainbaux SARL v. Harbormaster Ltd. [1955] 1 Lloyd's Rep 303
In re Stone & Saville's Contract [1963] 1 WLR 163
Edridge v. Sathna [1933] 60 IA 363
Oxford v. Provand [1868] LR 2 PC 135
Lamare v. Dixon [1873] LR 6 HL 414
Mama v. Sassoon [1927-28] 55 IA 360
Karasandas v. Chotalal 25 LR Bom 1037
Berners v. Fleming [1925] 1 Ch 264
Babu Bindeshri Prashad v. Mahant Jairam Gir [1886-87] 14 IA 173
Tan Ah Boon v. State of Johor [1936] AIR PC 236
Erlanger v. New Sombrero Phosphate Co. [1877-78] 3 App Cas 1218

Legislation referred to:
Contracts Act 1950, s. 56(1), (2)
Evidence Act 1950, ss. 91, 92
Evidence Act [Ind], s. 91
Specific Relief Act 1950, ss. 21(1), (3), 23(b), 34(1)(c), 35, 36
Specific Relief Act 1877 [Ind], s. 24(b)

For the appellant - P. Vijendran; M/s. R. R. Chelliah Brothers
For the respondent - Vadiveloo; M/s. Vadiveloo & Co.

JUDGMENT

George Seah FJ:

For the purpose of this appeal the appellant will be referred hereinafter as the plaintiff and the respondent as the defendant. The relevant facts may be stated shortly.

The plaintiff is at all material times the registered owner of four acres of land in the kampong of Sungei Burong in the Mukim of Tanjong Karang held under EMR 5071 and made up of:

(i) Lot No.10671 for 3 acres of padi land (hereinafter referred to as the First Property) and

(ii) Lot 5481 for 1 acre of coconut plantation and the premises thereon (hereinafter referred to as the Second Property).

Following the death of her husband the plaintiff became the registered owner by way of transmission of another four acres of land in the same kampong and district held under EMR 5072 and made up of:

(a) Lot No. 10665 for 3 acres of padi land (hereinafter referred to as the Third Property) and

(b) Lot 5482 for 1 acre of coconut plantation and the premises thereon (hereinafter referred to as the Fourth Property).

On 9 September 1974 the plaintiff agreed to sell all the four parcels of lands to the defendant at the price of RM90,000. This sale and purchase agreement was reduced into writing by the execution of two contracts and marked as Exhibits P1 and P2. Exh. P1 covered the sale of the First and Second Properties and the purchase price was stated to be RM75,000. And Exh. P2 was in respect of the sale of the Third and Fourth Properties and the purchase price was RM15,000. The combined total price amounted to RM90,000. Under the term of the contracts the date for completion was fixed for 31 March 1977. Up-to-date the plaintiff said that the defendant paid only the sum of RM26,000 and when the defendant failed to pay the balance of the full purchase price on due date or within a reasonable time thereafter the plaintiff purported to rescind the contracts on 9 November 1977.

At the time of the signing of the contracts the plaintiff alleged that she orally agreed to allow the defendant to enter into occupation and to cultivate the First Property from 10 September 1974 onwards and until the actual completion of the contracts the defendant was to pay to the plaintiff a sum of RM1,000 at the end of each padi harvest every 6 months. It was further alleged that the defendant wrongfully entered and took possession of the Second, Third and Fourth Properties in November 1977 or thereabout after the defendant had been informed by the plaintiff that the said contracts had been repudiated.

Following these events the plaintiff on 11 May 1978 took out a writ in the High Court at Kuala Lumpur against the defendant seeking, *inter alia*, a declaration that the said contracts had been effectively rescinded, forfeiture of the said deposits, damages for trespass, *mesne* profits and other ancillary relief.

By his defence the defendant raised a number of issues of mixed law and fact and they were conveniently summarised by the learned Judicial Commissioner under five heads, namely:

(1) The actual selling price. Was it RM90,000 as claimed by the plaintiff or RM75,000 as alleged by the defendant.

(2) The actual date for completion of sale. Was it 31 March 1977 as contended by the plaintiff or 31 March 1978 as claimed by the defendant.

(3) Whether Lot No. 10671 (First Property) was leased to the defendant as alleged by the plaintiff while the defendant contended that he was in lawful occupation by virtue of being a beneficial owner under the contract Exh. P1.

(4) The amount paid by the defendant: Was it RM26,000 as alleged by the plaintiff or RM59,000 as claimed by the defendant.

(5) Whether time was made the essence of the contracts.

The defendant also counterclaimed for specific performance of the said contracts on payment of the sum of RM11,000 (later amended to RM16,000) or alternatively, damages for breach of contracts and in the further alternative rescission of the said contracts and repayment to the defendant the sum of RM64,000 (later reduced to RM59,000) together with another sum of RM59,000 as agreed liquidated damages.

The learned Judicial Commissioner found in favour of the plaintiff in respect of questions 1, 2, and 3, namely that the agreed purchase price under the two contracts marked as Exh. P1 and P2 was RM90,000, that the date for completion of the said contracts was 31 March 1977 and that the First Property was leased to the defendant as from 10 September 1974 onwards and that the defendant agreed to pay to the plaintiff a sum of RM1,000 at the end of each padi harvest every six months. As regards Question 4 the learned Judicial Commissioner held that the defendant paid to the plaintiff and/or to her agent the total sum of RM36,000 and on the last question, the Court ruled that time was not made the essence of the contracts. Since the learned Judicial Commissioner found that the defendant was ready and willing to complete the sale the Court ordered the contracts to be specifically performed subject to payment by the defendant into Court to the credit of the plaintiff the sum of RM54,000 within six weeks from date of judgment. The Court also awarded to the plaintiff RM3,000 representing arrears of rent for the use and occupation of the First Property described as Lot No. 10671 for three padi harvests up to the month of November 1977 with interest at 8% per annum. In the result the main claim of the plaintiff was dismissed with costs to the defendant.

On reading the memorandum of appeal it seems that the plaintiff accepted the findings of the learned Judicial Commissioner with regard to questions 1, 2, and 3 but was dissatisfied with the conclusions on questions 4 and 5 as well as the order directing specific performance of the contracts.

As there was no cross-appeal by the defendant on the findings of the Judicial Commissioner relating to questions 1, 2, and 3 we would therefore assume that the defendant too was quite prepared to accept them.

The first question to be considered in this appeal was whether the learned Judicial Commissioner was right in holding that the defendant had paid to the plaintiff and/or to the plaintiff's agent the sum of RM36,000. It seems that the learned Judicial Commissioner had accepted the testimony of the plaintiff that in the year 1975 the defendant had paid a total sum of RM26,000 made up of (a) RM10,000, (b) RM10,000 and (c) RM6,000 *vide* receipts marked Exhibits D5A, D5B and D6A respectively. How did the learned Judicial Commissioner arrive at this figure of RM36,000 when the plaintiff only claimed that RM26,000 was paid by the defendant? According to the plaintiff and under the term of Exh. P1 the defendant agreed to pay a deposit of RM10,000 on the signing of the agreement but he had failed to do so. The defendant's version was that the said deposit was paid to and received by the plaintiff's agent, Perumal (PW2) as evidenced by a cheque marked as Exh. D8. In the Court below, PW2 admitted receiving Exh. D8 from the defendant on 9 September 1974 and that he cashed it on the following day at the request of the defendant. PW2 also said that he handed the RM10,000 back to the defendant after cashing the cheque. This was denied by the defendant. The learned Judicial Commissioner rejected the testimony of PW2 on this point and ruled that the said RM10,000 was retained by PW2 on behalf of the plaintiff following the execution of Exh. P1. Furthermore, relying on the acknowledgment in Exh. P1 and ss. 91 & 92 of the Evidence Act 1950, the learned Judicial Commissioner said that "it was sufficient for me to come to the conclusion, as I did, that plaintiff had received the RM10,000 deposit".

In his judgment the learned Judicial Commissioner held that PW2 was in fact plaintiff's agent. In our judgment, it was not sufficient to show that the RM10,000 was paid to PW2 as agent of the plaintiff, the learned Judicial Commissioner should have gone further and consider whether or not the defendant had discharged the onus of proving that PW2, as agent, had authority to receive the deposit of RM10,000 on behalf of the plaintiff (see *The Firm of TARCT*

a *v. The Firm of SVKR* [1955] 2 PC and [1952] MLJ 198 CA). It is clear from the notes of evidence that the defendant had made no attempt to discharge this burden. True, the learned Judicial Commissioner found as a fact that a sum of RM10,000 was paid by the defendant to PW2 in March 1975 when the plaintiff was in India. But the record shows that on plaintiff's return to Malaysia the money was handed to her by PW2 and the plaintiff in turn issued a receipt for the sum of RM10,000 to the defendant as evidenced by either Exh. D5A or D6A. *b* As Lord Esher MR said in *Linck Moeller & Co. v. Jameson & Co.* [1885-86] 2 TLR @ 207:

> To draw such an inference in business matters would be most dangerous.

In that case where a contract of sale stipulated that payment should be made to the sellers, it was held by the Court of Appeal that the purchaser was not justified in paying the purchase money to a broker merely on the ground that, upon a previous transaction between *c* the parties, the sellers had authorised payment to such broker, who had duly paid over the money to them.

Although Clause 3 of Exh. P1 appears to contain an acknowledgment by the plaintiff of the receipt of the sum of RM10,000 from the defendant at the time of the signing of the contract, it was submitted by learned Counsel that the plaintiff was not estopped by ss. 91 and 92 to adduce evidence that the RM10,000 was in fact not paid to or received by her. Authority for *d* such a proposition may be found in the Privy Council case of *Sah Lal Chand v. Indarjit* [1899-00] 27 IA 93, where it was held that (i) s. 91 of the Indian Evidence Act (which is in the same terms with s. 92 of our Evidence Act 1950) does not preclude oral evidence to contradict a recital of fact in a written contract and (ii) it is settled law that, notwithstanding an admission in a sale deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be *e* afforded for the grossest frauds. In our judgment, the learned Judicial Commissioner was therefore wrong in law to shut out the oral testimony of the plaintiff that she did not in fact receive the RM10,000 from the defendant at the time of signing of Exh. P1 or at any time thereafter. Since the plaintiff had expressly denied receiving the RM10,000 from the defendant and in the absence of any evidence that PW2 paid over the RM10,000 to the plaintiff, the finding of the learned Judicial Commissioner by way of inference, that the plaintiff had received *f* the deposit of RM10,000 could not be supported. Based on the finding of the Court the RM10,000 was and appears to be still being retained by PW2.

Having regard to the conclusion reached by this Court it is plain that up to the date of the filing of the writ, the defendant had only paid to the plaintiff the total sum of RM26,000 out of the agreed purchase price of RM90,000.

g The second question we have to determine was whether the learned Judicial Commissioner was right in holding that it was not the intention of the parties to make time the essence of the contracts.

In contract for the sale of land the time fixed by the parties for completion or performance is not to be strictly construed unless it is the intention of the parties that time should be of *h* the essence of the contract (see *Jamshed v. Burjorji* [1915] AIR PC 83, *Stickney v. Keeble* [1915] AC 386, *Warren v. Tay Say Geok & Ors.* [1965] 1 MLJ 44 and s. 56(1) of the Contracts Act 1950). Intention may either be express or implied and there are three cases in which time is of the essence of the contract:

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(a) where the contract expressly states that time shall be of the essence of the contract *(Steedman v. Drinkle* [1916] AC 275 and *Brickles v. Snell* [1916] 2 AC 599);

(b) where time was not originally of the essence of the contract but has been made so by one party giving a notice to the other. Such notice can only be given after the other party has been guilty of unreasonable delay and the time mentioned in the notice must be reasonable *(Stickney v. Keeble (supra));*

(c) Where from the nature of the property time may be considered to be of the essence of the contract *(Tilley v. Thomas* [1867] 3 Ch App 61).

These three principles are cited by the then Court of Appeal in the case of *Haji Hassan v. Tan Ah Kian* [1963] MLJ 175 @ 176. In *Yeow Kim Pong Realty Ltd v. Ng Kim Pong* [1962] MLJ 118 the Privy Council said at p. 120:

> The question whether time is the essence of a contract is one to be determined by ascertaining the real intention of the parties. This is to be gathered by the examination amongst other things of attendant circumstances.

In *Jamshed* case the material facts are these:

> On 8 July 1911 the respondent agreed in writing to sell the leasehold interest to the appellant for Rs.85,000 and the appellant paid Rs.4000 of this sum as deposit. This agreement provided by Clause 1 and 2 that the title was to be made marketable; that the conveyance was to be prepared and received within two months from the date of the agreement; that on signing the document of sale Rs.80,500 were to be paid and after its registration the remaining Rs.500. The 5th clause provided that on payment of the Rs.81,000 as provided by Clause 2 the document of sale or conveyance was to be executed but should the purchaser not pay the amount within the fixed period abovementioned he was to have no right to the deposit of Rs.4,000 paid on account and any claim of his was to be void and the vendor was, after that date, to be at liberty to resell.
>
> On 3 October 1911, more than two months after the date of the contract solicitors for the appellant requisition for a certificate or letter from the Collector stating that all the covenants and conditions of the lease had been performed and fulfilled. The respondent did not comply with this requisition but on 6 October 1911 asserted a right to put an end to the contract on the ground that time was of its essence and to forfeit the deposit on the ground that the appellant had failed to complete his purchase with the date fixed.

After stating the relevant law and equity Viscount Haldane in delivering the judgment of the Privy Council said at p. 85:

> Applying these principles to the agreement before them, their Lordships are of the opinion that there is nothing in its language or in the subject-matter to displace the presumption that for the purpose of specific performance time was not of the essence of the bargain. They do not think that the subject-matter or the character of the lease sold were such as to take the case out of the class to which the principle of equity applies...

Earlier on the learned Judge said:

> *Prima facie,* equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of Law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in the subject-matter.

In the case of *Lee Yew Hin v. Kow Lup Piow* [1974] 1 MLJ 114 the appellant had entered into a contract with the respondent for the purchase of 105 acres out of about 1045 acres of rubber lands. The respondent himself had agreed to purchase the lands from a third person. A deposit of RM22,000 was paid by the appellant and it was agreed that the balance of the purchase price should be paid on or before 20 November, 1967. The appellant did not pay the balance of the purchase price on that date, and the deposit was forfeited. The appellant brought an action for rescission of the contract, for the refund of the deposit of RM22,000 and for damages against the respondent. The learned Judge held that the deposit was rightly forfeited. On appeal to the Federal Court, it was held that as the appellant had bound himself to pay the balance of the purchase price on 20 November 1967 and as he had failed to do so, he had committed a breach of the contract and the respondent was entitled to repudiate the contract and to forfeit the deposit.

However, on examination of the judgment of Gill FJ it was clear that Clause 10 of the contract provided that time wherever stipulated in the agreement shall always be deemed to be of the essence of the contract.

There was therefore an express provision making time to be of the essence of the contract. On the other hand, no such clause was inserted in *Jamshed* case. Despite a term providing for the forfeiture of the deposit if the balance of the purchase price was not paid on the time fixed by the parties, the Privy Council held on construing the language and subject-matter of the contract that time had not been made the essence.

Now, what are the facts in this case? It appears that in Exh. P1 Clause 3 provides, *inter alia*, that the balance of RM65,000 shall be paid on 31 March 1977. And in the event that Somoo s/o Sinniah (defendant) fails to pay the balance of RM65,000 to Ganam d/o Rajamany (plaintiff) the money (deposit) of RM10,000 shall be forfeited and not to be claimed (see Clause 6). Similar conditions are provided in Exh. P2 that the balance of RM10,000 shall be paid on 31 March 1977 (Clause 3) and in default the deposit of RM5,000 shall be forfeited (see Clause 6). It is common ground that there was no provision in both Exh. P1 and P2 expressly making time to be of the essence of the contracts and that the defendant had not paid the deposit of RM5,000 under Exh. P2.

Applying the principles stated in *Jamshed* case and since the subject-matter of the contracts consists of padi lands and coconut plantations and having regard to the language used in the contracts, we reach the same conclusion as the learned Judicial Commissioner that the parties had not intended to make time the essence of the contracts.

The learned Judicial Commissioner held further that where time was not originally of the essence of the contract but if the plaintiff wanted to make it so she should give reasonable notice to the defendant in plain and clear language and as the plaintiff had failed to give any notice to the defendant to complete within a reasonable time named therein and making time to be of essence of the contracts, the plaintiff was wrong in law to rescind the two contracts on 9 November 1977. In the judgment of the learned Judicial Commissioner the rescission was premature, illegal and of no effect.

For the plaintiff it was submitted by learned Counsel that since the defendant was not going to pay the balance of the purchase price of RM54,000 to the plaintiff it was therefore unnecessary to give any notice making time of the essence of the contracts. In support of this submission learned Counsel appears to rely on *Establishment Chainbaux SARL v. Harbormaster Ltd.* [1955] 1 Lloyd's LR 303 and *In re Stone & Saville's Contract* [1963] 1 WLR 163. In *Establishment* case the relevant facts are these:

Sale of marine engine units by defendants to plaintiff French Company in July 1951 - payment to be by a letter of credit payable against shipping documents in favour of defendants/sellers to be opened in London within a few weeks - delivery to start in eight months from 1 July - plaintiffs/buyers unable immediately to obtain sterling enabling them to furnish letter of credit - time for opening letter of credit of the essence of the contract - no complaint of delay by sellers - intimation by buyers to sellers on 9 October that sterling was then available accepted without comment by sellers on 11 October - contract cancelled by sellers on 22 October "having regard to the protracted delay that has occurred over the establishment of letter of credit" - claim by buyers for damages for non-delivery - letter of credit to be opened within a few weeks - effect of acquiescence by sellers in buyers' offer to provide letter after a few weeks had expired - no reimposition by sellers of term that time was of the essence - whether sellers justified in cancelling.

Held that buyers were in breach of their obligation to open letter of credit within a few weeks which was a condition precedent to the delivery of the goods, but that that breach was waived by the subsequent conduct of the sellers; that although the sellers' letter of 11 October made it plain that they were not reimposing any term that time was of the essence, they had nevertheless proved that at the time of the cancellation the buyers could not have complied with their obligation to provide a letter of credit within any reasonable extension of time; and that accordingly the sellers were justified in cancelling - judgment for defendants.

We agree with the submission of learned Counsel for the defendant that the facts in *Establishment* case are distinguishable from the facts in the instant case in that the former case, the furnishing of a letter of credit within a few weeks was a condition precedent and time for opening the letter of credit was made the essence of the contract.

In *re Stone & Saville* (*supra*), the vendor's solicitors could not answer the requisition of the purchaser despite a number of reminders but nevertheless gave notice to the purchaser to complete. Instead the purchaser rescinded the contract and requested for the return of the deposit. The vendor's solicitors informed the purchaser that the deposit was forfeited. The purchaser took out a vendor and purchaser summons seeking a declaration that the vendor had failed to discharge his obligations and claiming return of the deposit.

At the Court of first instance Buckley J made a declaration that the contract had been effectively rescinded and that the purchaser was entitled to repayment of the deposit. On appeal to the Court of Appeal the judgment of Buckley J was upheld. At p. 169 Lord Denning MR said:

... it seems quite plain to me that the vendor was at fault. He was guilty of a breach going to the root of the contract because he was not, on the face of his documents, able to make a good title to this land. The purchaser was entitled to treat that breach as a repudiation giving her a right to rescind the contract. And she did so by that letter of 4 September 1961. The vendor's solicitors regarded the position differently. They took the view that the purchaser was at fault but they accepted the position that the contract was rescinded ...

In our opinion, the case appears to establish that if the purchaser was entitled to rescind because the vendor was guilty of a fundamental breach going to the root of the contract it was unnecessary for the purchaser to give notice to the vendor making time to be of the essence of the contract. The case of *re Stone & Saville* (*supra*), in our opinion, does not support the proposition that if a purchaser had made default in payment of the balance of the purchase price on the time fixed for performance (if time was not of the essence) the vendor was entitled to rescind the contract unilaterally. In our judgment, the proposition that in a contract for the sale and purchase of land (where time is not of the essence) the

fact that the purchaser was not going to pay the balance of the purchase price on the date fixed for performance or within a reasonable time thereafter, would *ipso facto* entitle the vendor to rescind the contract unilaterally without the necessity of giving to the purchaser reasonable notice making time to be the essence of the contract, would appear to be contrary to the provisions of s. 56(2) of the Contracts Act 1950 and s. 34(1)(c) of the Specific Relief Act 1950 as well as the authorities such as *Jamshed* case (*supra*) and *Stickney v. Keeble* (*supra*). This submission of the learned Counsel for the plaintiff also fails.

It follows that we agree with the learned Judicial Commissioner's finding that the unilateral act of the plaintiff in purporting to rescind the two contracts marked as Exh. P1 and P2 on 9 November 1977 without giving to the defendant reasonable notice making time to be of essence was wrong in law.

A wrongful repudiation by one party cannot, except by the election of the other party, so to treat it, put an end to an obligation; if the other party still insists on performance of the contract the repudiation is what is called *brutum fulman* that is, the parties are left with their rights and liabilities as before. A wrongful repudiation of a contract by one party does not of itself absolve the other party if he sues on the contract from establishing his right to recover by proving performance by him of conditions precedent (per Lord Wright in *Edridge v. Sathna* [1933] 60 IA 363).

In this case, the wrongful rescission of the said contracts was not accepted by the defendant and this appears to be plainly stated in a letter dated 25 November 1977 by the defendant's solicitors to the plaintiff (Exh. P3). The defendant further stated in the letter that he was ready and willing to complete the sale by paying to the plaintiff the balance of the purchase price of RM21,000 and asked the plaintiff to specifically perform the said contracts. The defendant reiterated his claim for specific performance in his counterclaim and the learned Judicial Commissioner was satisfied that he had made out a case and allowed it subject to payment into Court to the credit of the plaintiff the sum of RM54,000 within six weeks from date of judgment.

Before us, learned Counsel for the plaintiff submitted that having regard to the wrongdoings and the unreasonable conduct of the defendant in these proceedings, the learned Judicial Commissioner ought not to have granted the equitable remedy of specific performance. Learned Counsel rightly pointed out that the jurisdiction to decree specific performance is a discretionary one (see s. 21(1) of the Specific Relief Act 1950) but the section also provides that "the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal". In other words it is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion the circumstances of the case, and the conduct of the parties and their respective interests under the contract, are to be remembered *(Oxford v. Provand* [1868] LR 2 PC 135 @ 151 and *Lamare v. Dixon* [1873] LR 6 HL 414 @ 423). Since the Court had decreed specific performance of the contracts the onus is on the plaintiff to satisfy this Court that the learned Judicial Commissioner had not properly exercised his discretion.

It was contended by learned Counsel for the plaintiff that in his defence filed in answer to the statement of claim, the defendant raised a number of frivolous and vexatious issues relating to (a) the purchase price, (b) the time fixed for completion and (c) the amount of money paid toward the said purchase which are in direct contradiction with the unambiguous terms of the contracts marked as Exh. P1 and P2. In the result, the learned Judicial

Commissioner ruled in favour of the plaintiff on all these three matters disputed by the defendant. We would like to remark in passing that quite a lot of the Court valuable time had been taken in adjudicating these three issues.

Now, in a suit for specific performance, a party treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to make good that averment brought with it the inevitable dismissal of his suit (see the dictum of Lord Blanesburgh in *Mama v. Sassoon* [1927-28] 55 IA 360 @ 372-373). Although, so far as the Act (Indian Specific Relief Act 1877 which is *pari materia* with our Specific Relief Act 1950) is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (s. 24(b) and our s. 23(b) is the nearest) it seems invariably to have been recognized, and on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same (see *Karasandas v. Chotalal* 25 LR Bom 1037 @ 1050). This principle has been consistently adopted and applied by the Courts in this country.

We now proceed to examine the grounds given by the Court for ordering specific performance of the two contracts Exh. P1 and P2. At p. 15 of his judgment, the learned Judicial Commissioner relied on a letter marked Exh. P3 dated 25 November 1977 written by the defendant's solicitors to the effect that "the defendant was ready and willing to complete the sale" and a passage in the testimony of the defendant at p. 43 of the record where the defendant was reported to have said: "I was prepared to pay the balance of the purchase price that was due to the plaintiff when I went to see my solicitor". In our opinion, for the purpose of considering this important question, it is necessary to see what was written in Exh. P3. In that letter it was stated that the defendant "is indeed ready and willing to complete the sale by paying the balance of the purchase price amounting to RM21,000 although the time for payment has not arrived." When the defendant testified in Court that he was ready and willing to pay the balance that was due to the plaintiff when he went to see his solicitors he was referring to the sum of RM21,000. Furthermore, in para. 13 of his pleading the defendant alleged that "The defendant at all material times has been ready and willing to pay to the plaintiff the balance of RM11,000 (this sum was later amended to read RM16,000 at the trial)". Although there was evidence that the defendant was ready and willing to complete the sale but it must be remembered that the defendant would only do so on his own terms based on the purchase price of RM75,000 and not on the agreed purchase price of RM90,000. Nowhere did the defendant plead nor did he say in evidence that if the Court should hold the contract price to be RM90,000 then he would be ready and willing to pay the balance as fixed by the Court. If the defendant had pleaded in this manner he might ask the Court to follow *Berners v. Fleming* [1925] 1 Ch 264. In our judgment, the stand taken by the defendant would appear to coincide with the one adopted by the plaintiff in the case of *Babu Bindeshri Prashad v. Mahant Jairam Gir* [1886-87] 14 IA 173. In that case the purchaser delayed payment of the purchase money of immovable estate, insisting upon the insertion in the conveyance of an absolute warranty of title by the vendor to the property sold and it was held that as a right to such covenant was not shown, his delay of payment was not excused, and there was no case for decreeing specific performance. At p. 177 the Privy Council said:

> ... and the position of the parties appears to be this: that the plaintiff has all along, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale deed with the warranty of title; and it is admitted by his learned Counsel at the Bar that he has no right to any such covenant. It has not been attempted to be shown

> that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance.

In our judgment, in the context of this case, it was not sufficient for a purchaser to prove that he had at all times been ready and willing to complete the sale; he must also prove that he had performed or had been at all times been ready and willing to perform his part of the contract (see *Mama v. Sassoon* (*supra*) and *Tan Ah Boon v. State of Johor* [1936] AIR PC 236) or his part of the obligations under the contract as fixed or interpreted by the Court (see *Berners v. Fleming* (*supra*) and *Warren* case (*supra*). Since the defendant was unable to bring his case under this principle, we think the learned Judicial Commissioner was wrong to decree an order that the contracts Exh. P1 and P2 be specifically performed. In our judgment, the learned Judicial Commissioner ought to have refused to make the order on the ground of unreasonable conduct of the defendant coupled with the fact that the case of the defendant, as pleaded and proved, comes within the principle of *Babu Bindeshri Prashad* case (*supra*).

Another matter which the learned Judicial Commissioner ought to consider which he did not appear to have done so is s. 21(3) of the Specific Relief Act 1950 which reads:

> A case in which the court may properly exercise a discretion to decree specific performance is where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

It seems clear that the defendant would be unable to bring his case under the provision of this subsection on the evidence produced before the Court below. Up-to-date of hearing in the High Court the defendant was proved to have paid the sum of RM26,000 only to the plaintiff and this amount represents less than one-third of the contract price of RM90,000. Furthermore, this cannot by any stretch of imagination be said to constitute substantial acts within the meaning of the subsection.

In his defence and counterclaim the defendant also pleads in the further alternative, rescission of the contracts and repayment to him by the plaintiff of the sum of RM64,000 (this was later reduced to RM59,000 at the trial) together with a further sum of RM64,000 (later amended to RM59,000) as agreed liquidated damages and interest at 18% per annum as from 9 September 1974. Since the plaintiff purported to have repudiated the said contracts on 9 November 1977 we would assume that the plaintiff would also like to have the contracts rescinded if specific performance was refused by the Court.

Now, the power of the Court to make an order rescinding a contract is contained in Chapter IV of the Specific Relief Act 1950 and the second limb of s. 36 is particularly relevant to this case and it reads:

> ... and the Court, if it refuses to enforce the contract specifically may direct it to be rescinded and delivered up accordingly.

But the rescission of a contract in writing cannot be adjudged unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made (see s. 35). This is what Lord Blackburn had to say about this in the case of *Erlanger v. New Sombrero Phosphate Co.* [1877-78] 3 App Cas 1218 @ 1278:

> It is, I think, clear on principles of general justice, that as a condition to a rescission there must be *restitutio in integrum.* The parties must be put in *status quo.* See per Lord Cranworth in *Addie v. The Western Bank* LR. 1 HL 165. It is a doctrine which has often been acted upon both at law and in equity ...

In our judgment, having regard to the facts of this case, it is a fit and proper case for us to exercise our jurisdiction contained in the second limb of s. 36 since we are satisfied that there is no difficulty in restoring the plaintiff and the defendant to their original position and we hereby rescind the contracts marked as Exh. P1 and P2 accordingly. *A fortiori*, a considerable time (almost ten years) has lapsed since the parties executed the said contracts.

Now, s. 37 provides that "on adjudging the rescission of a contract, the Court may require the party to whom the relief is granted to make any compensation to the other which justice may require". The principle underlying this section is whether compensation should be awarded at all or what should be the measure of compensation must depend on the special circumstances of each case. The aim shall be to restore the contracting parties as much as possible to the same position which existed before the contract. In other words, there should be a restitution of the benefits received. As Lord Blackburn rightly pointed out in *Erlanger v. New Sombrero Phosphate Co.* (*supra*) at p. 1278:

> It would be obviously unjust that a person who has been in possession of property under the contract which he seeks to repudiate should be allowed to throw that back on the other party's hands without discounting for any benefit he may have derived from the use of the property, or if the property, though not destroyed, has been in the interval deteriorated, without making compensation for that deterioration.

In short, he who seeks equity must do equity. Applying this to the facts of this case, we would make an order that the defendant should be entitled to compensation only by way of the return of the sum of RM26,000 paid by him to the plaintiff and we so order. In our opinion, no man can at once treat the contract as avoided by him, so as to assume the property which he parted with it, and at the same time keep the money or other advantage which he has obtained under it. In our judgment, the defendant is not entitled to damages when the contracts are cancelled by the Court under s. 36 of the Specific Relief Act 1950, and we make no order under this head.

It is common ground that the defendant went into occupation of the First Property described as Lot No. 10671 on or about 10 September 1974 and agreeing to pay RM1,000 per padi harvest every six months. The defendant only paid RM3,000 representing three padi harvests and the learned Judicial Commissioner ordered him to pay to the plaintiff another RM3,000 for six padi harvests calculated up to the month of November 1977. There is no cross-appeal by the defendant against this order.

In or about November 1977 it is not disputed that the defendant entered into possession of the Second, Third and Fourth Properties described as Lot 5481, Lot 10665 and Lot 5482 respectively without the consent and against the wishes of the plaintiff. It seems that the defendant is presently still in occupation of these three parcels of land.

Now, the Third Property is also padi land containing the same acreage and similar condition as the First Property. Whereas the Second and Fourth Properties are coconut plantations.

In her amended statement of claim the plaintiff is claiming from the defendant *mesne* profits in the manner following:

(a) RM3,500 per padi harvest every six months as from 1 April 1977 (since the learned Judicial Commissioner had awarded compensation up to November 1977 the date should now read 26 November 1977) in respect of the First Property;

(b) RM100 every two months as from 26 November 1977 in respect of the Second Property;

(c) RM3,500 per padi harvest every six months as from 26 November 1977 in respect of the Third Property; and

(d) RM60 every two months as from 26 November 1977 in respect of the Fourth Property.

Since the two contracts had been rescinded by the Court we hold that the plaintiff is not entitled to *mesne* profits in respect of these four properties but only to reasonable compensation as justice may require. In our judgment, compensation should be assessed at RM1,000 per padi harvest every six months for the First and Third Properties from 26 November 1977 onwards until vacant possession is delivered up to the plaintiff. The claims of RM100 and RM60 for the unlawful occupation of the Second and Fourth Properties which are coconut plantations for every two months from 26 November 1977 onwards seem reasonable and in the absence of evidence to the contrary, we would allow the claims in full until vacant possession is yielded up to the plaintiff. As the next padi harvest will be due in the latter part of the year we order the defendant to deliver up vacant possession of the First and Third Properties to the plaintiff on or before 30 November 1984. The defendant, however, is ordered to yield up vacant possession of the Second and Fourth Properties to the plaintiff on or before 30 September 1984. It follows that the defendant is ordered to pay compensation to the plaintiff in the manner following:

(a) As regards the First Property (padi land) the sum of RM14,000;

(b) As regards the Second Property (coconut plantation) the sum of RM4,600;

(c) As regards the Third Property (padi land) the sum of RM14,000; and

(d) As regards the Fourth Property (coconut plantation) the sum of RM2,760.

In the exercise of our discretion, we do not think we should award interest to be paid by the parties concerned.

Under the circumstances of the case, we allow the plaintiff to set-off against the RM26,000 which she is ordered to pay to the defendant as compensation.

We therefore set aside that part of the judgment of the learned Judicial Commissioner decreeing specific performance of the contracts marked as Exh. P1 and P2, as well as the order for costs. We order that each party to pay his or her own costs here and in the Court below.

To that extent the appeal is allowed.

Also found at [1984] 2 CLJ 268